Supreme Court, U.S.
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No. 92-1575

In The

Supreme Court of the United States

October Term, 1992

GEORGE E. MERCIER and SUSAN Y. MERCIER,

Petitioners,

vs.

SHERATON INTERNATIONAL, INC., a/k/a
ITT-SHERATON INTERNATIONAL, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The parent company of respondent is ITT Sheraton Corporation. Respondent's affiliates and subsidiaries (other than wholly owned subsidiaries) are listed as follows:

1. Consolidated Hotels Ltd. – Hong Kong
2. Touristica Tobasco S.A. de C.V. – Mexico
3. East India Hotels Ltd. – India
4. Hotel Atlantis, A.G. – Switzerland
5. Gaborone Int'l Hotel Co. – Botswana
6. Sovamit – Russia
7. Keivo Resort Development Co., Ltd. – Japan
8. Amar Hotel Investment Corp. N.V. – Antillies
9. Turistica Cancun S.A. de C.V. – Mexico
10. Sheraton Royal Orchid Co., Ltd. – Thailand
11. ITT Hotel Corporation – Tunisia
12. Turistica Ixtapa S.A. de C.V. – Mexico
13. Indo-Pacific Sheraton Ltd. – Hong Kong
14. Hotels Sheraton De Portugal – Portugal
15. Chesham Hotels Ltd. of Liechtenstein
16. Sociedad Immobiliara San Cristobal S.A. – Chile
17. Opeadora InterAmericana De Hotels S.A. – Mexico
18. Breakwater Island Trust – Australia
19. Mirage Pty. Limited – Australia
20. Balatern Pty. Ltd. – Australia

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Sheraton International, Inc., respectfully requests that this Court deny the Petition For a Writ Of Certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 981 F.2d 1345 (1992).

STATEMENT OF THE CASE

The case arises out of a dispute involving the possible lease of space in the Istanbul Sheraton Hotel for use as a gambling casino. At all times relevant the hotel was

owned by a Turkish investment company named Taksim Otelcilik A.S. ("Taksim Otelcilik"). The hotel was leased from Taksim Otelcilik and was operated by the Turkish division of Sheraton International, Inc., which maintains an Istanbul office.

Sheraton International, Inc., hereafter "Sheraton International", is a holding company for Sheraton hotels outside of the United States. It is a Delaware corporation headquartered in Boston, Massachusetts, but otherwise conducts no business in the United States. It is a wholly-owned subsidiary of ITT Sheraton Corporation, but it retains a separate roster of officers and directors and has assiduously observed all corporate forms in order to make clear its separate corporate identity.

Petitioners allege that sometime in 1983 Susan Mercier and her father, George Mercier, both United States citizens, entered into a written Memorandum of Understanding ("the Memorandum") with Sheraton International regarding the rental of space in the Istanbul Sheraton Hotel for the purpose of operating a casino. The casino was to be operated by a corporation to be formed by the Merciers and Fethi Deliveli, a Turkish national.

The Memorandum, which was negotiated and executed in Turkey,[1] required fulfillment of two conditions precedent:

> First, the Memorandum provided that it should become effective "only after the

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[1] The district court found that virtually all of the key witnesses to this action are Turkish nationals and all relevant negotiations and executions occurred in Turkey.

> approval of the Sheraton Corporation [Sheraton International's parent company] in Boston has been obtained."
>
> Secondly, the Memorandum was "subject to [the Merciers and Deliveli] obtaining the necessary [casino] permits from the Turkish Government." Further, the Memorandum allowed that "[i]f for any reason this agreement is not approved then the [Merciers and Deliveli are] not entitled to claim any damages, expenses or indemnities.

It is undisputed that these preconditions required by the Memorandum never occurred.

The following year, on March 3, 1984, Sheraton International executed a second document entitled a "Protocol" with a Turkish corporation named Lidya Turistik Tesisler Isletmesi A.S. ("Lidya"). Deliveli's family and the Merciers were the sole stockholders of Lidya and exercised complete control of the corporation. The Protocol, which by any reasonable interpretation superseded the 1983 Memorandum, provided to Lidya a conditional option for the lease of space in the Istanbul Sheraton Hotel to operate a casino.

Specifically, the Protocol provided initially for the operation of slot machines in a leased space of approximately 150 square meters. Sheraton International also agreed to offer space for a traditional casino within twenty-four (24) months if certain preconditions were met.

Among other terms, the Protocol provided that:

> This agreement will come to force subject to approval of the concept of gambling by the

> Owning Company of Sheraton [i.e., Taksim Otelcilik] and after the realization of Mercier participation in Lidya. Moreover, if these points are not realized within ninety (90) days as of the signature, this agreement will be null and void.

Further, the Protocol contained a forum selection and choice of law clause which read:

> This agreement will be governed by Turkish laws and the jurisdiction will [sic] Istanbul, Turkey.

Finally, the Protocol provided that, if no agreement was reached between Sheraton International and Lidya, Sheraton was free to contract with a third party.

Despite the concerted efforts of Sheraton personnel, the Turkish hotel owner, Taksim Otelcilik, did not approve the Protocol within the time specified.

The plaintiff Merciers claim that in April 1984, subsequent to execution of the Protocol, they purchased slot machines for the casino and shipped them to Lidya in Turkey. By the summer of 1984, Lidya had opened a different casino in Marmaris, Turkey, which was managed by the plaintiff Susan Mercier. Relations between the Merciers and Deliveli ultimately deteriorated, and sometime thereafter the Merciers assigned their interest in Lidya to Deliveli in exchange for the slot machines and any interest or right retained by Lidya in the Memorandum and Protocol.

The Merciers further allege that on May 27, 1986, based upon their interests in the Memorandum and Protocol, they entered into an oral partnership with a British

company, Leisure Investments P.L.C. ("Leisure"). Leisure was to operate a casino at the Istanbul Sheraton Hotel.

At some point in early 1986, Susan Mercier fled Turkey due to an unfortunate incident involving a violent assault and stabbing by a former lover, Mahmut Cunudi Gungor, a Turkish national. Ms. Mercier alleged at the district court level, and during the first appeal, that it was unsafe for her to return to Turkey because of her pending arrest. This claim, as to which the district court and the court on the first appeal spent considerable time, turned out to be false and stale. She had been acquitted of those charges by the Turkish courts. In short, her claimed fear of returning to Turkey, and her claims of fear of criminal prosecution if she did return, which lay at the foundation of her original argument in the district court, turned out to be without basis, although she did not inform the courts below until the lie was revealed. Even now, after all that, Ms. Mercier still offers up wholly unsubstantiated claims of physical danger. The courts below have found these claims to be unpersuasive.

Relations between the Merciers and Leisure deteriorated rapidly. In October 1987, well after both the Memorandum and Protocol had expired, a wholly-owned subsidiary of Leisure (Leisure Investment (Overseas) Limited) entered into an agreement with Sheraton International and Taksim Otelcilik authorizing Leisure to lease space in the hotel and to establish a casino on terms acceptable to the Turkish government. The casino opened in 1988.

In July, 1988, the Merciers filed a lawsuit against Leisure and The Sheraton Corporation, the parent company of Sheraton International, in the New York state trial court. Subsequently, the action was removed to the federal district court for the Western District of New York. On October 12, 1989 the district court dismissed the claims against The Sheraton Corporation as it is not a party to the contracts upon which the Merciers sued.

In January 1990 the Merciers filed a complaint in the federal district court in Massachusetts alleging that Sheraton International breached its purported agreements with them, induced Leisure to breach its oral agreement with them, and intentionally interfered with their relationship with Leisure, Sheraton filed an answer and moved to dismiss on the ground of the doctrine of *forum non conveniens*.

On August 10, 1990, the district court granted Sheraton International's motion to dismiss. An order of dismissal was entered on August 14, 1990. The Merciers appealed the district court decision on September 7, 1990.

The First Circuit Court of Appeals, in its first decision dated June 4, 1991, *Mercier v. Sheraton International, Inc.*, 935 F.2d 419 (1st Cir. 1991), held that the district court had acted prematurely in concluding that Turkey was an adequate alternative forum. In particular, the Court stated that the affidavit of Sheraton's Turkish legal expert, Professor Yucel Sayman, had failed to satisfy fully the initial burden of a defendant seeking a *forum non conveniens* dismissal. The case was remanded to the district court to conduct additional factual inquiry and, if appropriate, to fashion a conditional dismissal.

In addition, the Court of Appeals concluded that, while the district court had properly evaluated certain public interest factors, it had erred with respect to others, namely, the relevance of the parties' citizenship and residence. Thus, the case was also remanded for the district court to reevaluate the public interest factors and to reconsider balancing them against the private interest factors.

After the remand, Sheraton International renewed its motion to dismiss on the ground of *forum non conveniens* on September 9, 1991, supported by additional expert affidavits of Dr. Sayman and an exhibit consisting of detailed statistical tables and 1990 federal court management statistics provided by the clerk of the district court relating to case congestion in the Massachusetts district court.

At a November 21, 1991 hearing on the renewed motion to dismiss, the district court announced its decision from the bench and again granted Sheraton International's motion to dismiss on the ground of *forum non conveniens*. The court's dismissal order was conditioned upon (1) acceptance of jurisdiction by the Turkish courts; (2) Sheraton International's submission to Turkish jurisdiction; (3) Sheraton International's waiver of any statute of limitations defense, and acceptance of the waiver by the Turkish court; and (4) Sheraton International's agreement to satisfy any Turkish judgment.

For the second time the Merciers again appealed the district court's dismissal order, claiming that the court abused its discretion in failing to properly balance public and private interest factors affecting the selection of

forum. The First Circuit affirmed the district court's dismissal order with modifications providing that Sheraton International make available in Turkey all evidence within their control to the extent such evidence would have been available in the United States.

REASONS FOR DENYING THE PETITION

The Merciers' Petition is deficient as it fails to set forth any important but unsettled questions of federal law. Furthermore, the decision rendered by the First Circuit below regarding dismissal for *forum non conveniens* did not conflict with any decisions of this court or any of the other circuits.

Finally, the First Circuit fully considered and correctly decided the issues below. Absent a clear abuse of discretion, the trial court's decision regarding *forum non conveniens* should not be disturbed.

I. THE LAW REGARDING FORUM SELECTION CLAUSES IS WELL SETTLED. PETITIONER FAILS TO RAISE ANY IMPORTANT NEW FEDERAL ISSUE.

Petitioner's first asserted ground for review asks this Court to consider whether the district court abused its discretion when it dismissed on the ground of *forum non conveniens* substantially on the basis of a forum selection clause which appears in a contract which Sheraton otherwise asserts is null and void. Petitioner's question fails to raise any issue of public importance, let alone a new one, and the petition for a writ of certiorari should therefore

be denied. *See*, Supreme Court Rules, Rule 10.1, as amended, July 1991.

The petitioner has misinterpreted the basis for the decision by the circuit court below. Dismissal was *not* based *substantially* on the basis on the forum selection clause. The forum selection clause was merely one factor weighed by the circuit court in balancing the private and public considerations as required by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Other factors, rightfully considered by the court below were (1) petitioners' interest in an American forum, (2) the connection between the dispute and the Massachusetts forum, (3) the availability of witnesses, (4) prior litigation activity in the Massachusetts forum, (5) potential difficulties with Turkish law, and (6) comparative docket congestion in both available forums. 981 F.2d at 1354-1358. The court of appeals did not emphasize any of these seven factors over another. After careful consideration of these issues, the court of appeals correctly concluded that the Turkish courts offered an adequate and available alternative forum.

Even assuming arguendo that the First Circuit substantially relied upon the forum selection clause, this petition should nonetheless be denied. The law regarding the effect and validity of forum selection clauses is well settled in this Court. See, *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Scherk v. Alberto – Colver Co.*, 417 U.S. 506, 519 (1974). This case presents no opportunity to address an important new federal question.

A forum selection clause in a contract should dictate a plaintiff's choice of forum "absent a strong showing that [the clause] should be set aside." *Bremen v. Zapata*

Off-Shore Co., 407 U.S. at 15. Petitioners' original choice of forum "was made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.*

Warming to his subject, petitioners' counsel argues that Sheraton cannot "have its cake and eat it too". This argument proceeds from an assertion that, because Sheraton alleges in its defense that its contract with the Merciers is void, Sheraton should not be allowed to rely on the forum selection provision contained in that very same contract. However, as shown below, petitioners' argument is without legal merit. Sheraton is entitled to rely upon the provision notwithstanding its assertion that the contract is void.

The forum selection clause is separate agreement, the validity of which is not a function of the validity of the agreement in which it was included. A party seeking to obviate a forum selection clause must prove that the inclusion of that particular clause in the contract was the product of fraud, coercion, or is in effect overreaching. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12, 15; *Scherk v. Alberto – Colver Co.*, 417 U.S. at 419; See also *Mutual Fire, Marine, and Inland Insurance Company v. Barry*, 646 F.Supp. 831, 833 (E.D. Pa. 1986).

– Petitioners do not claim that they did not freely enter into contract negotiations with Sheraton. Further, the fact that Sheraton alleges in its defense to the Merciers' claims that the contract is void for failure to satisfy expressed preconditions, can hardly be considered "overreaching".

To hold otherwise would discourage defendants in contract claims from raising formation defenses for fear of affecting forum selection.

II. THE DECISION RENDERED BY THE FIRST CIRCUIT COURT BELOW IS NOT IN CONFLICT WITH DECISIONS RENDERED BY THIS COURT OR ANY OF THE OTHER CIRCUIT COURTS.

A writ of certiorari should not be granted unless "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works,* Inc., 261 U.S. 387, 393 (1923). Petitioners fail to set forth any real conflict. Even alternatively they fail to present a conflict or legal issue sufficiently important to require review by this Court.

Petitioners argue that by allowing respondent to rely upon the forum selection clause – while at the same time alleging that the contract containing that clause is void – the circuit court has taken a position inconsistent with that of the Fifth Circuit in *Burt v. Isthmus Development Co.,* 218 F.2d 353 (5th Cir. 1955), *cert. denied,* 349 U.S. 922 (1955). Petitioners have however, misinterpreted *Burt*. No real conflict exists between the two decisions.

Burt must be distinguished on its facts. In *Burt* the appellant, Edward Burt, alleged and offered proof that a contract was never formed. Burt in essence alleged that there was no meeting of the minds or mutual agreement with respect to all the material terms in the contract, *including choice of forum.* In contrast, in the present case the Merciers do not allege or set forth any facts even suggesting a failure in contract formation. Rather, the

Merciers argue that the Protocol was indeed valid and binding, and they seek damages for Sheraton's alleged failure to perform. Thus, the incongruity addressed by the court in *Burt* is not present here. Petitioners do not deny their mutual agreement upon all terms of the contract, including the selection of forum clause.

Even assuming arguendo that the First Circuit does conflict with the decision in *Burt*, the conflict fails to rise to the level required for review. Application of the forum selection clause was not at the core of the holding in *Burt*. The Fifth Circuit there merely weighed the import of the clause as a factor in evaluating dismissal for *forum non conveniens*. Likewise, the First Circuit here analyzed the effect of the forum selection clause in the protocol as a *factor* effecting dismissal. The two courts merely applied the factor in a different fashion. The differing applications of these factors by the two courts does not reach the level of a "real and embarrassing conflict of opinion and authority" required for approval of a Writ of Certiorari. *Layne & Bowler*, 261 U.S. at 393.

III. THE FIRST CIRCUIT COURT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES BELOW.

In the second of two questions presented to this Court for review, petitioners allege that the First Circuit abused its discretion in affirming the district court's order of dismissal. As shown below, however, the First Circuit properly applied the balancing test of private and public factors as set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). There was no abuse of discretion.

Dismissal for *forum non conveniens* requires that an alternative forum be adequate, available and sufficiently more convenient for the parties, making transfer necessary to avoid unfairness. Further, application of the doctrine *forum non conveniens* is committed to the sound discretion of the trial court whose decision will not be reversed absent a "clear abuse of discretion." *Piper Aircraft v. Reyno*, 454 U.S. 235, 257 (1981).

Sheraton has shown amply that the Turkish courts provide an adequate and available alternative forum. Sheraton has agreed to submit to the jurisdiction of the Turkish courts for this case. The Turkish courts are perfectly able to dispose of the substantive issues at hand; and practical considerations do not effectively prohibit litigation of the subject matter in the Turkish courts. In sum, there are no significant legal or political obstacles to conducing the litigation in the Turkish forum.

Nonetheless petitioners contend that the First Circuit abused its discretion by:

> a. "deeming irrelevant certain personal or social considerations such as plaintiff's fear for her physical safety in the other forum and evidence of anti-American bias in the general population of that other nations;
>
> b. Finding a witness (Fethi Deliveli) to be important and unavailable in the local forum despite the lack of evidence that he would not voluntarily appear in the domestic forum or that his evidence would be important;
>
> c. Failing to compare the disparate need for translators in the two forums under consideration;

d. Failing to consider the disparate financial resources of the parties; and/or

e. Failing to consider the fact that the motion was made after respondent but not petitioners had obtained discovery.

The First Circuit addressed each of these factors, and, in its sound discretion, found them to be unpersuasive.

Petitioners place particular emphasis on the fact that Susan Mercier may be subject to physical harm should she return to Turkey. The lower court emphasized that, while it was sensitive to Ms. Mercier's fear for her physical safety, her personal situation did not effect the adequacy of the Turkish forum. Further the Turkish courts are willing to accept deposition or affidavit testimony from Ms. Mercier in lieu of a personal appearance. 981 F.2d at 1348.

Ultimately Ms. Mercier's fear for her physical safety fails to raise an important public question of federal law. Petitioners' contentions (that this issue be given a broader scope because of "ever increasing international terrorism") are without merit. This Court should not be called upon to determine the relative safety of nations. Furthermore, Ms. Mercier's assertions of fear arise from personal incidents, not from international terrorist activity.

With respect to the remaining four issues set forth by the petitioners, respondents offer the following:

(1) *Deliveli's Unavailability* – Deliveli is by definition an unavailable witness in the United States. The First Circuit rightfully decided that the importance of his testimony favored trial in Turkey. 981 F.2d at 1355. Deliveli's

unavailability does not raise any federal issues which require review. Availability of witnesses is a factor which has previously been thoroughly considered by this court. See, *Piper Aircraft v. Reyno*, 454 U.S. 235, 258.

(2) *Necessity of Translators* – Translators are always required when the forum nation does not speak english as its native language. The Merciers knew that translators would be necessary when they agreed to resolve all their contract disputes in Turkey. The need for translators hardly rises to the level of an important federal issue.

(3) *Disparity of Financial Resources* – The First Circuit considered the disparity in financial resources between Sheraton and the Merciers and found that the Turkish costs bond requirement was not excessive. 981 F.2d at 1344. The Merciers are not indigent. The cost of litigation in Turkey is not prohibitive, nor does it cause prejudice to the Merciers in the prosecution of their claims.

(4) *Prior Discovery by Sheraton* – The First Circuit concluded that the discovery obtained by Sheraton prior to the motion was limited in scope and therefore not prejudicial to the Merciers. 981 F.2d at 1356.

In determining each of the above issues, the First Circuit applied sound reasoning for their decision. There was no abuse of discretion, and certainly nothing rising to the level of a "clear" abuse of discretion. Further none of the issues above raise any important and unsettled questions of federal law.

IV. CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari does not present any question warranting review. The Court should deny the petition.

Respectfully submitted,

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